In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1340

NEW YORK DISTRICT COUNCIL NO. 9, INTERNATIONAL BROTHERHOOD OF PAINTERS & ALLIED TRADES, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

and

ASSOCIATION OF MASTER PAINTERS AND DECORATORS OF THE CITY OF NEW YORK, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A14) is reported at 453 F. 2d 783. The decision and order of the National Labor Relations Board (Pet. App. A15-A86) are reported at 186 NLRB No. 140.

JURISDICTION

The judgment of the court of appeals was entered on January 19, 1972 (Pet. 3). The petition for a writ of certiorari was filed on April 18, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a union violates its bargaining obligation under the National Labor Relations Act by unilaterally imposing, through enforcement of a union rule, a production quota which was rejected by the employer in bargaining negotiations and which negates the work standard specified in the collective agreement.

2. Whether the Board's unfair labor practice complaint was barred by the six-month limitations period in Section 10(b) of the Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at pp. 4-7 of the petition.

STATEMENT

A. The Board's Findings of Fact

For over 30 years the Association of Master Painters and Decorators of the City of New York, Inc. ("the Association") has represented employer-mem-

bers in bargaining for the associationwide collective bargaining unit (Pet. App. A50). The historical bargaining practice has been for the Union and the Association to negotiate a contract and, thereafter, for independent employers to enter into substantially similar agreements with the Union (Pet. App. A51). On March 5, 1968, while collective bargaining agreements were in effect, the Union adopted a resolution that no journeyman member employed on New York City Housing Authority repaint work should paint more than 10 rooms per week, effective April 1, 1968 (Pet. App. A16). The resolution provided for sanctions against union members who failed to adhere to it (Pet. App. A17). Prior to the announcement of the resolution, overall production averaged 11.5 rooms per man for a 35-hour workweek (Pet. App. A16).

The Association vigorously protested the Union's "unilateral action" in adopting a production quota on the ground that such a quota was contrary to both the existing collective bargaining agreement and established trade principles (Pet. App. A17, A63). The Union, however, rejected the Association's protest as well as its suggestion that the matter be submitted to arbitration (Pet. App. A17-A18). Although the Association threatened court action to compel arbitration, it ultimately decided instead to pursue the issue in forthcoming negotiations for a new contract (Pet. App. A18).

These negotiations began in June of 1968, and were still in progress on July 31, 1968, when the existing agreement expired and the Union struck (Pet. App. A18). At the outset, the Union submitted

a list of bargaining demands, which included the following: "The Union shall have the right to establish a maximum standard of production" (Pet. App. A18, A67-A68). The Association rejected this demand and countered with a proposal—which it soon abandoned—that "[d]uring the life of this Trade Agreement neither party to it shall promulgate any rules establishing a standard of production, or continue in force, or make any rules or by-laws conflicting with its provisions" (Pet. App. A18-A19). The Union's demand for a production quota provision remained on the table, and was discussed at meetings on July 26, August 19, and September 3. On the latter date, all major contract issues between the parties were resolved except that pertaining to production quotas (Pet. App. A19, A69-A70). The parties decided to drop that subject, rather than permit it to interfere with the consummation of a contract and termination of the strike (Pet. App. A19, A72-A73).

On September 9, 1968, the parties formally executed a new contract, and the strike ended (Pet. App. A19). The new contract, which was not to expire until July 31, 1971, contained no reference to the Union's 10-room work limitation rule. It did, however, contain provisions carried over from the previous contract that employees would work a 7-hour day, 5-day workweek, and would be paid on an hourly rather than a piecework basis (Pet. App. A16, A19, A24).

After the strike ended, the Union intensified its efforts to enforce the 10-room rule and threatened to fine members who violated that rule (Pet. App. A19). As a result, production fell with respect to some employers, from an average of 11.5 rooms per week per man to an average of 10 rooms (Pet. App. A24). Some employees stopped work after completing 10 rooms even though they had worked less than the 7-hour day or 35-hour week provided for by the new contract (Pet. App. A24). Although the Association protested continued enforcement of the 10-room rule, the Union refused to change its position on the matter. Finally, on December 27, 1968, five Association members and several independent employers filed unfair labor practice charges with the Board alleging that the Union's unilateral imposition of work limitations violated Section 8(b)(3) of the Act (Pet. App. A19, A48, A50-A51).

B. The Board's Conclusions and Order

On the foregoing facts, the Board (with one member dissenting) concluded that "the Union unilaterally effected changes in wages and the workweek which were neither sanctioned by the contract nor accepted by the Employers," and "thus sought to secure without bargaining what it had failed to achieve in bargaining" (Pet. App. A24-A25). Accordingly, the Board held that the Union, "by unilaterally enforcing its 10-room maximum production quota on and after September 9, 1968, violated Section 8(b)(3) of the Act" (Pet. App. A25). Since the Board limited

its unfair labor practice finding to events occurring within six months of the filing of the charge, it further held that the proceeding was not barred by Section 10(b) of the Act (Pet. App. A21-A22, A25).

The Board ordered the Union to cease and desist from the unlawful conduct found and, upon request, to bargain collectively in good faith prior to enforcing any production quota against employees in the appropriate bargaining units (Pet. App. A29).

C. The Decision of the Court of Appeals

The court of appeals (with one judge dissenting) enforced the Board's order. The court held that "the Union's enforcement of the 10-room rule violates the term of the September 9th collective bargaining agreement that stipulates that the standard work week for journeymen painters shall consist of five seven-hour days." For "[b]y enforcing the rule the Union is in substance modifying this term to stipulate that journeymen are not to work a five day, seven-hour per day work week, but are to work only so long as it takes them to paint 10 rooms" (Pet. App. A8). The court also held, in agreement with the Board, that the unfair labor practice complaint was not time-barred by Section 10(b) of the Act (Pet. App. A6-A7).

ARGUMENT

1. Petitioner's contention (Pet. 21-28) that the enforcement of its 10-room rule was not a refusal to bargain is predicated on the assumption that the rule

did not modify or violate the collective agreement (Pet. 25-26). The Board, however, found that the enforcement of the 10-room rule resulted in employees "stopping work after completing 10 rooms, even though they had worked less than the 7-hour day or 35-hour week provided for by the collective bargaining agreement" and that, since employees "were paid on a salary basis, the Union's action in these instances effected changes both in the wages paid employees and in their workweek (Pet. App. A24). This finding, which was affirmed by the court of appeals, is not seriously disputed.

Petitioner, however, argues that, since the collective bargaining agreement did not expressly provide that any given number of rooms would be painted, under *Scofield* v. *National Labor Relations Board*, 394 U.S. 423, it was free to adopt work rules setting maximum limits on the number of rooms painted, even if the rules resulted in employees working less than 35 hours a week (Pet. 26). The *Scofield* case does not support this argument. There the employer "signed contracts recognizing [the work rule]" and neither "the * * * [work rule] itself or compliance with it by [the] union violate[d] the collective contract" (394 U.S. at 433). Here, by contrast, as the Board found, the work rule "effected changes both in the wages paid employees and in [their] workweek contrary to provisions of the collective bargaining agreement (Pet. App. A24).

2. There is no merit to the Union's contention that, even if enforcement of the 10-room rule consti-

tuted a contract violation, the Board does not have authority to find such a contract violation to be an unfair labor practice (Pet. 28-31). While the Board does not have general jurisdiction to remedy breaches of a collective agreement, it does have power to remedy such a breach where that is incidental to providing a remedy for an unfair labor practice. See *National Labor Relations Board* v. *C & C Plywood Corp.*, 385 U.S. 421. Since the Union's action in enforcing its 10-room rule constituted a modification of the collective agreement without complying with the terms of Section 8(d) of the Act, the Union violated its duty to bargain collectively under the Act,[1] and the Board has power to remedy that unfair labor practice notwithstanding that it also may entail a breach of contract. See *National Labor Relations Board* v. *Strong*, 393 U.S. 357, 360-361.

3. The Union further contends that the unfair labor practice complaint "was * * * time-barred by Section 10(b) of the * * * Act, which bars complaints [based on an unfair labor practice charge] filed more than six months after the occurrence of an unfair labor practice * * *" (Pet. 14). The Union relies on the fact that the 10-room rule was promulgated on

[1] Section 8(d) provides that "where there is in effect a collective-bargaining contract * * * the duty to bargain collectively shall * * * mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification" serves a written notice of proposed termination or modification within a specified period, and continues the contract in effect "for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later" (Pet. 5, 6-7).

March 5, 1968, and the unfair labor practice charge in this case was not filed until December 27, 1968. But, the Board based its finding of a violation on the fact that the Union sought to enforce its 10-room rule after a *new* contract had been signed on September 9, 1968 (Pet. App. A25, n. 7). As the court below correctly stated, "regardless of whether the announcement of the 10-room rule in March of 1968 constituted an unfair labor practice under the old collective bargaining agreement, a distinct violation occurred in September of 1968 if the 10-room rule conflicts with the terms of the new collective bargaining agreement" (Pet. App. A6). Since the court found that such a conflict exists, it properly held that the complaint was not time-barred.[2]

---

[2] *Local Lodge No. 1424, International Association of Machinists, AFL-CIO* v. *National Labor Relations Board*, 362 U.S. 411, relied on by petitioner (Pet. 15), is not to the contrary. In that case, a union and an employer entered into a collective bargaining agreement containing a union security clause, at a time when the union did not represent a majority of the employees. More than six months after the execution of the contract, a complaint was issued charging that the inclusion of the union security clause, at a time when the union represented less than a majority of the employees, constituted a unfair labor practice. This Court held that the complaint was barred by Section 10(b) because the "unfair labor practice * * * [could] not be made out except by reliance on the fact of the agreement's original unlawful execution, an event which, because of limitations, * * * [could] not itself be made the subject of an unfair labor practice complaint * * *" (362 U.S. at 419). In the instant case, however, the execution of the contract, which is critical to the unfair labor practice finding here, occurred on September 9, 1968, well within the 10(b) period.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

PETER G. NASH,
General Counsel,

NORTON J. COME,
Assistant General Counsel,

EUGENE B. GRANOF,
Attorney,
National Labor Relations Board.

JUNE 1972.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1972 467765 804

LIBRARY
SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1340

NEW YORK DISTRICT COUNCIL NO. 9, INTERNATIONAL BROTHERHOOD OF PAINTERS & ALLIED TRADES, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

ASSOCIATION OF MASTER PAINTERS AND DECORATORS OF THE CITY OF NEW YORK, INC.,

Respondent-Intervenor.

BRIEF FOR RESPONDENT-INTERVENOR IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DONALD G. MCCALLION
Counsel for Respondent-Intervenor
110 East 42nd Street
New York, New York 10017
Tel. No. (212) OX 7-0880

FRED P. ELLISON
of Counsel

TABLE OF CONTENTS

	PAGE
Citation of Opinion Below	1
Statute Involved	2
Questions Presented	2
Statement of the Case	2
Argument	3
Conclusion	8

TABLE OF CASES

Associated Home Builders of the Greater East Bay, Inc. v. N.L.R.B., 352 F. 2d 745 (9th Cir. 1965)	4
Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962)	7
Cutler v. N.L.R.B., 395 F. 2d 287 (2d Cir. 1968)	4
Local Lodge No. 1424, International Association of Machinists (Bryan Manufacturing Co.) v. N.L.R.B., 362 U.S. 411 (1960)	6, 7
N.L.R.B. v. Acme Industrial Co., 385 U.S. 432 (1967)	8
N.L.R.B. v. C & C Plywood Corp., 385 U.S. 421 (1967)	7
N.L.R.B. v. Insurance Agents' International, 361 U.S. 477 (1960)	5
N.L.R.B. v. Katz, 369 U.S. 736 (1962)	5
N.L.R.B. v. Landis Tool Co., 193 F. 2d 279 (3d Cir. 1952)	4
Scofield v. N.L.R.B., 394 U.S. 423 (1969)	5

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1340

NEW YORK DISTRICT COUNCIL NO. 9, INTERNATIONAL BROTHERHOOD OF PAINTERS & ALLIED TRADES, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

ASSOCIATION OF MASTER PAINTERS AND DECORATORS OF THE CITY OF NEW YORK, INC.,

Respondent-Intervenor.

BRIEF FOR RESPONDENT-INTERVENOR IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This brief is submittd on behalf of the Association of Master Painters and Decorators of the City of New York, Inc. (the "Association"), a Respondent in this Court and Intervenor in the Court below, in opposition to the petition filed herein by Petitioner (the "Union") for a writ of certiorari.

Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit and the dissenting opinion (App-A) are reported at 453 F. 2d 783.

Statute Involved

The statute involved is the National Labor Relations Act, as amended (the "Act"), particularly sections 8(b)(3), 8(d), 10(a) and 10(b) thereof (29 U.S.C. secs. 158(b)(3), 158(d), 160(a) and 160(b), respectively). The pertinent provisions of sections 8(b)(3), 8(d) and 10(b) are set forth at pp. 4-7 of the Petition. Section 10(a) insofar as applicable, provides that "The Board is empowered . . . to prevent any person from engaging in any unfair labor practice . . . This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise . . ." (29 U.S.C. sec. 160(a)).

Questions Presented

1. Whether the Union violated its statutory duty under sections 8(b)(3) and 8(d) of the Act to bargain collectively with the Association by unilaterally enforcing, without the agreement, consent or acquiescence of the Association, a work production limitation rule during the term of a collective bargaining agreement between the Union and the Association.

2. Whether the complaint of Respondent National Labor Relations Board (the "Board") based on the Union's unilateral enforcement of its work production limitation rule was timely issued under section 10(b) of the Act.

3. Whether the Board had jurisdiction to issue the order enforced by the Court below.

Statement of the Case

The Association adopts as its statement of the case the facts as accurately and concisely stated in part "I." of the opinion of the Court below (App-A, pp. A-3 through A-5).

ARGUMENT

I. The decision of the Court below is clearly correct and is not in conflict with any decision of any other Court of Appeals nor with any decision of this Court.

A. The Union committed an unfair labor practice in violation of section 8(b)(3) of the Act by unilaterally enforcing its previously adopted 10-room per week work production limitation rule during the term of the September 9, 1968 collective bargaining agreement between the Union and the Association.

Section 8(b)(3) of the Act makes it an unfair labor practice for a union to refuse to bargain collectively with an employer. Section 8(d) of the Act provides, in substance, that where a collective bargaining agreement is in effect, the duty to bargain collectively means that no party to the agreement shall modify it unless the party desiring such modification meets four statutory conditions. One of these conditions, which is particularly pertinent here, is that the party desiring modification must continue all of the terms and conditions of the existing agreement in full force and effect until the expiration date thereof.

The September 9, 1968 collective bargaining agreement between the Union and the Association was in effect from September 9, 1968 through July 31, 1971, the date it expired. The agreement provided a standard work week for journeymen painters of five seven-hour days. The agreement also provided that during the life of the agreement, neither party to it "shall *continue in force* or make any rule or by-law conflicting with its provisions." (italics added) (App-B, p. A-17).

During the life of the September 9, 1968 collective bargaining agreement, the Union enforced a work production limitation rule previously adopted by it which prohibited its members from painting more than 10 rooms per week

on New York City Housing Authority repaint work. This was done without the agreement, consent or acquiescence of the Association or its employer members. As the Court below succinctly stated, the Union's enforcement of its 10-room rule modified the standard work-week and work-day term of the agreement "to stipulate that journeymen are not to work a five day, seven-hour per day work week, but are to work only so long as it takes them to paint 10 rooms." (App-A, p. A-8).

The Union, by enforcing its 10-room rule, not only breached the agreement but violated section 8(d) of the Act by effecting a unilateral modification of the agreement and by failing and refusing to continue in full force and effect all of the terms and conditions of the agreement until the expiration date thereof. Since the duty to bargain collectively under section 8(b)(3) of the Act requires compliance with 8(d), the Union's violation of 8(d) necessarily constitutes a violation of 8(b)(3). On this branch of the case, the decision below is clearly correct.

The decision below is in harmony with the view expressed by the Court of Appeals for the 9th Circuit in *Associated Home Builders of the Greater East Bay, Inc.* v. *N.L.R.B.*, 352 F. 2d 745, namely, that a work production quota unilaterally imposed by a union in contravention of the wage, hour and working condition provisions of an existing collective bargaining agreement would violate 8(b)(3) and 8(d) of the Act (352 F. 2d at 751-752).

The decision below is not in conflict with any other Court of Appeals decision nor with any decision of this Court. *Cutler* v. *N.L.R.B.*, 395 F. 2d 287 (Petition, p. 23) did not involve a work production limitation. It involved union demands for higher wages and a welfare plan during negotiations for a collective bargaining agreement. This case, unlike *Cutler*, involves a work production limitation, not merely demanded, but actually *enforced* in violation of an *existing* agreement. *N.L.R.B.* v. *Landis Tool Co.*, 193 F. 2d 279 (Petition, p. 22) has nothing at all to do with

the issues here involved. The inapplicability of those two cases is further evidenced by the fact that they are not even cited in the dissenting opinion below, on which the Union so heavily relies.

Neither *N.L.R.B.* v. *Insurance Agents' International,* 361 U.S. 477, nor the question left open in footnote 28 to that case (Petition, pp. 21-22) involved a work production limitation imposed by a Union in contravention of an existing collective bargaining agreement. Likewise, *N.L.R.B.* v. *Katz,* 369 U.S. 736 (Petition, p. 22) dealt with unilateral conduct, this time on the employer's part, during negotiations for an agreement, not during the life of an existing agreement.

As the Court below said (App-A, p. A-8), the Union's reliance on *Scofield* v. *N.L.R.B.,* 394 U.S. 423 (Petition, p. 25) is misplaced. That case did not involve section 8(b)(3) or 8(d) of the Act. It involved charges by union members that fines imposed by their union violated their section 7 rights. The imposition of the fines in no way violated the collective bargaining agreement there involved. The employer in that case had signed contracts recognizing the union's production ceiling, had tolerated the ceiling and cooperated in its administration. The ceiling was at a level above the production level of the average worker.

This case, unlike *Scofield,* involves sections 8(b)(3) and 8(d) of the Act, not section 7. The Union's enforcement of its 10-room rule clearly violated the collective bargaining agreement. The Association here never signed any contracts recognizing the 10-room rule, never tolerated it, and never cooperated in its administration. The 10-room per week limitation was below, not above, the production level of the average journeyman painter.

In *Scofield,* this Court stated that had the employer been successful in obtaining an agreement which eliminated the production ceiling, such agreement "unquestionably would have been violated by the union rule." (394 U.S. at 432). Since the employer not only could not attain such an agree-